



# NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

**FOR IMMEDIATE RELEASE**  
**Thursday, February 29, 1996**

**(R-2127)**  
**202/273-1991**

**NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE  
and  
INDIANA UNIVERSITY SCHOOL OF LAW INDIANAPOLIS**

**SEVENTEENTH ANNUAL SEMINAR  
ON LABOR-MANAGEMENT RELATIONS**

***"BEYOND 'THEM AND US' LITIGATION:  
THE CLINTON BOARD'S ADMINISTRATIVE REFORMS AND  
DECISIONS PROMOTING LABOR-MANAGEMENT COOPERATION"***

**Luncheon Address**

**Delivered by:**

**William B. Gould IV  
Chairman  
National Labor Relations Board**

**February 29, 1996  
The Westin Hotel  
and  
Convention Center  
Indianapolis, Indiana**

I am honored to address this Seventeenth Annual Labor-Management Relations Seminar, which has a long history of constructive contributions to labor-management relations in the United States. These kinds of forums involving labor, management, government and academia bring about better understanding by all the people whose expertise and good faith are required to make our unique system of free collective bargaining work. It is a pleasure to be here to discuss with you some of the recent developments and issues of current concern involving the National Labor Relations Board.

I am honored to be introduced by Leland Cross who was one of the founders of the seminar. It is the largest seminar of this type of which I am aware. I know how much hard work it takes to put on an event like this. The members of the local labor bar who contribute their time and expertise to the seminars are to be commended as well as the University of Indiana Law School and NLRB Region 25.

Though this Californian has only had one previous visit to Indiana, as a Boston Celtic fan since the franchise was formed in '46, I am sure that you will know that the centrality of French Lick native Larry Bird's contribution to 3 of those 16 World Championships, makes me feel good, in the words of the jazz tune, to be "Back Home in Indiana."

This is also an opportunity to salute Congressman Tim Roemer of the Third District of Indiana, who has been so helpful to me and our Agency as a member of the House Committee on Economic and Educational Opportunities, Subcommittee on Oversight and Investigations.

And I could not come to Indiana without acknowledging its most loyal Hoosier, my Chief Counsel William Stewart -- a Phi Beta Kappa graduate of the University of Indiana, class of '54 and an Order of the Coif graduate of the Law School in '59 as well -- whose genuflection before the altar of Bobby Knight never ceases to amaze me! A classmate and friend of Senator Birch Bayh while in Indiana Law School, Bill loves to joke that he held the incumbent Governor of Indiana, Evan Bayh, on his lap in those Bloomington days!

And not only is this a chance to access the direction of the Board on the eve of the second anniversary of my confirmation as Chairman by the Senate -- but also on a more personal note on that same day, March 2, I will be in Los Angeles to attend the wedding of my second oldest son, Timothy Samuel Gould, the first of the three Gould boys to exchange marital vows. Thus, both professionally and personally, it is a time for celebration as well as reflection about the past and contemplation on the years to come.

For the past year the NLRB has been caught up in the debate between the 104th Congress and the Clinton Administration over the budget and the role of the Federal Government in our society. Our Agency's budget for fiscal year 1996 which

began last fall on October 1, five months ago, still has not been approved by the Congress. Since that time both due to lack of appropriations and the eastern blizzard of '96, the Agency has been shut down entirely on two occasions for a total of more than three weeks, and we have been funded by "continuing resolutions" at a level 25 percent below fiscal 1995. Fortunately, with furlough protection in the temporary spending bills, we have been able to avoid layoffs. The continuing resolution under which we are operating expires March 15.

The effect of the budget impasse already has impaired the NLRB's ability to carry out its statutory functions under the National Labor Relations Act. We have not filled vacancies since last year, reducing Agency employment by attrition to around 1,950 -- down from last year's authorized level of 2,052. We have sharply curtailed travel and have eliminated completely non-case processing travel and all other discretionary expenses. This has required NLRB field examiners to do almost all investigations by phone interviews rather than traveling to the site of the alleged unfair labor practice. Since salaries and fixed expenses total more than 90 percent of our budget, any deep cuts in our budget would necessitate drastic action, including unpaid furloughs and layoffs, inflicting hardship on many Agency employees and on the labor and employer community that depends on a timely and effective response from the Agency.

Ironically, of all agencies under attack in the Congress, the NLRB's mandate is perhaps the most consistent with the goal of reducing and decentralizing the role of the Federal Government in our society. Our small Agency never grew into a huge regulatory bureaucracy. The genius of the Wagner Act was -- and is -- that it minimizes the role of government in fashioning the rules of the workplace, leaving their determination to decentralized, private processes including free collective bargaining for those who choose it in secret ballot elections.

Moreover, our Agency provides a legal framework for a peaceful and orderly process for resolving workplace issues. As Senator Robert F. Wagner put it more than 60 years ago, the purpose of the NLRB is "... to promote peace rather than strife and to appeal to the better judgment and good intentions of industry and labor."<sup>1</sup>

As I have said, March 2 is the second anniversary of my confirmation by the Senate as Chairman of the NLRB. I am pleased to report that we have significantly speeded up the Board's decision-making processes and reduced the outstanding case backlog to an historically low level. And, in the first quarter of our fiscal year 1996, an appellate court enforcement rate of 90 percent, in whole or part, is an indication of the quality of the Board's decisions and exceeds the rate of successful enforcement in at least two decades!

---

<sup>1</sup> Address to the U.S. Senate, March 1, 1934 quoted in the Labor Law Journal, January, 1996, inside cover page.

The two years have passed quickly and have been a real learning experience, not so much in labor law -- though I am continuously dazzled by new doctrines and precedents which somehow escaped my scrutiny in a quarter of a century of teaching and writing and 6 years of practice -- but in the ways and politics of Washington. This was not new to me in an intellectual sense, but to live it has been a unique experience.

I am pleased to have taken up the challenge posed by President Bill Clinton's June 28, 1993 nomination of me -- and the guiding legislative hand of Senator Edward Kennedy of Massachusetts in that process. Immediately after my appointment was confirmed by the Senate, upon my recommendation, the Board appointed two private sector advisory panels composed of 50 of America's most distinguished labor lawyers, 25 who represent unions and 25 who represent employers. The appointees came from all geographic areas and industry sectors, including Leland Cross from here in Indianapolis. These distinguished men and women agreed to serve without pay or reimbursement by the government for their expenses for attending meetings in Washington twice yearly. The advisory panels have proved to be an invaluable resource and sounding board for the Board and the General Counsel -- and they have come to symbolize one of the abiding themes of my Chairmanship -- i.e., an attempt to consult with both labor and management to foster harmony and, where practicable, cooperation between the parties.

One of the first proposals discussed with the advisory panels grew out of my research in Japan back in the 1970s. One of the differences between industrial relations in the U.S. and Japan which I found to be particularly striking during my work there is the greater use in Japan of informal dispute resolution processes and the less frequent resort to litigation. So, when I came to the NLRB, the first innovations I proposed were designed to decrease the need for time-consuming and costly litigation by instituting new procedures for the Board's Administrative Law Judges.

The Agency's experience has been that a high percentage of voluntary settlements, more than 90 percent, are reached early in the process, but once the cases are scheduled for formal hearings before Administrative Law Judges, the rate of settlement historically has dropped off sharply. The time and cost of ALJ hearings and appeals to the Board and courts are high, so substantial savings result from each settlement that is reached short of a hearing. One of my main goals upon coming to the NLRB two years ago was to reduce costly and needless litigation by encouraging voluntary compliance and informal mechanisms for resolving disputes as early as possible in the procedure. This led me to focus on the role of the Administrative Law Judge in the case resolution process. Drawing on my studies in Japan nearly 20 years earlier, I advanced several proposed changes designed to increase the settlement rate at the ALJ step of the procedure.

My original proposal contained the following elements:

- 1) Authorize and encourage ALJs, as is the practice of the Labor Commissioner in Japan, where appropriate in their opinion, to propose recommended settlements to the parties prior to, during or at the conclusion of the hearing process.
- 2) Authorize the appointment of "settlement judges" in appropriate cases to meet with the parties in an effort to bring about a settlement of the case short of a formal ALJ hearing. If a settlement is not reached, the case would be heard by a different judge who would not be privy to the discussions of the parties with the settlement judge.
- 3) Authorize Administrative Law Judges, in appropriate, simple cases to dispense with post-hearing briefs or proposed findings and conclusions, to hear oral argument and to issue bench decisions either at the conclusion of the hearing itself or within 72 hours of that time.

Initial discussions of my proposals within the Board, with the General Counsel's organization and with the union and management advisory panels at their first meetings met with skepticism from all sides and parties. Some feared that the prospect of the appointment of a settlement judge would undermine efforts by the NLRB Region to reach a settlement by causing the parties to hold out for a better deal from the settlement judge. Tied to this concern was an expressed anxiety about erosion of regional office turf.

Several of the union advisory panelists raised the objection that the settlement judge process would introduce delay into an already too lengthy procedure. Others expressed skepticism that the settlement efforts would bear fruit after the "battle lines" had been drawn by the parties and the Regional Director. Some Administrative Law Judges felt that the proposal was not consistent with their judicial role. A Board member expressed concern that the bench decision proposal would impair the parties' right of due process. As has been the case with most of my initiatives of these past 2 years, this was a long distance run filled with considerable loneliness, to paraphrase the title of the book by the British writer Alan Sillitoe.

Despite the objections, the Board voted to initiate in February 1995, a one-year trial project for the Administrative Law Judge proposals, but with a couple of modifications. The settlement judge procedure would be invoked by the Chief Administrative Law Judge on his own motion or on the request of any party or the judge assigned to hear the case -- unless any party objects. The proposal that ALJs be encouraged to formally propose settlement terms to the parties during the course of a hearing was dropped.

In adopting the new rules, the Board recognized that the changes could give rise to problems if they were not carefully and properly applied. The Board noted that many cases are not suitable for the expedited bench decisions procedures, and if inappropriate cases are selected, they could result in remands which could delay the final disposition of the cases rather than expedite them. However, a majority of the Board felt that if Administrative Law Judges choose the cases carefully, the benefits of expediting them would outweigh the potential problems. In order to provide some guidance to the judges, the Board suggested certain types of cases in which it may be appropriate to dispense with briefs and/or to issue bench decisions, such as cases that turn on a very straightforward credibility issue; cases involving a well-settled legal issue where there are no disputed facts; short-record, single-issue cases; or cases where a party defaults by not appearing at the hearing. My own view is that cases which are resolved primarily on the basis of credibility determinations are the most suitable of all. Contrarily, more complex cases, including cases with long records, would be inappropriate candidates for bench decisions or dispensing with briefs.

Before the trial procedures commenced, a two-day seminar workshop on settlement and mediation techniques was held in Washington for all NLRB Administrative Law Judges, and the new procedures were thoroughly explained. The seminar was led by three experienced labor mediators. The sessions helped develop a positive attitude among the judges toward their new role and to equip them to be more effective when acting as settlement judges.

It was not long after the new rules were in effect that it became clear that settlement judges were making a difference. In selecting cases or possible assignment of settlement judges at his initiative, Chief Judge David Davidson focused initially on cases with trial estimates of 10 days or more and before long on cases with trial estimates of 5 days or more. When these cases do not settle, they take substantial time of trial counsel, the parties, and judges. Because they take longer to try, longer to brief, longer to decide, and are most likely to be appealed to the Board and the Courts of Appeal, several years or more may elapse from the time the case is initiated until it is finally decided.

Experience under the one-year trial project in settling these cases was highly favorable. We estimate that more than a year of ALJ hearing days were saved as a result of settlement judge dispositions, resulting in savings to the NLRB of more than \$100,000 in out-of-pocket hearing expenses and travel costs alone. Even if some of those cases might have settled later at the hearing sites, the early settlements assisted by the settlement judges saved the government and the private parties much of the cost of trial preparation that otherwise would have been incurred.

The total number of settlement judge assignments from February 1, 1995 through this date is 66 cases -- and 41 of them have resulted in settlements. However, since the continuing resolution's imposed cuts which began on

October 1, we have not had the money to put settlement judges in the field. And this has deflated our ability to use the process and, of course, instances of actual settlement.

Initially, most assignments of settlement judges have been initiated by the Chief Judge's office, but the parties soon began to request assignment of settlement judges, and in every case to date, absent objection by another party, a settlement judge has been assigned when requested by a party to the case. As an experiment in one of the Board's regions, the Regional Director selects a group of cases each month and requests assignment of a settlement judge to spend one or two days in the region in consecutive face-to-face conferences for all of the cases in the group. This approach seems to be working very well, with some cases settling even before the settlement judge arrives, and many others settling at or after the settlement conferences.

The rule changes involving oral arguments and bench decisions were designed to help judges decide cases more quickly. They give judges the discretion to dispense with post-hearing briefs or proposed findings and conclusions, to hear oral argument, and to issue bench decisions. The judge may dispense with briefs and still issue a written decision, but if the judge wishes to issue a bench decision, with or without a written supplement, he will also dispense with written post-hearing briefs.

The rule requires a judge to notify the parties at the opening of a hearing or as soon thereafter as practicable that he or she may wish to hear oral argument in lieu of briefs. Thus far, the impact of these procedures has not been as great as with settlement judges. Only about two percent of ALJ decisions have been bench decisions -- 14 bench decisions have been delivered since February 1, 1995.

But it is my judgment that we can and will see more use of this procedure. Notwithstanding the understandable intuition of many of my brethren at the bar, a substantial number of our cases do not require briefs, let alone voluminous briefs by learned counsel, filled with case citations! Quite frequently they require deliberation rooted in old-fashioned common sense which often is difficult to apply -- but which can and should be applied expeditiously.

Our experience under the trial project was reviewed with the union and management advisory panels last November and their impressions from experience under the trial of the new procedures was discussed. What a difference a year made! The comments from both union and management panels was almost universally favorable. The Board's proposal to make the new ALJ procedures was posted for public comment in December, and in February the Board voted to make the new procedures permanent effective tomorrow, March 1, 1996.

In addition to our approach on settlement judges -- which, again, is designed to substitute mediation and the peaceful resolution of disputes for litigation, through the case adjudication process -- the Board has employed a similar approach to our interpretation of Section 8(a)(2) of the Act as it relates to employee committees or councils, whether created by an employer or not. As you know, this is the subject of the TEAM Act which was passed by the House of Representatives in September 1995, and is now pending before the Senate.

That bill would make inoperative Section 8(a)(2)'s strictures against employer dominated or assisted labor organizations to most situations where a "sham" union necessitates the intervention of law. My sense is that the TEAM Act is an inappropriate response to whatever problems exist under Section 8(a)(2) and that it would promote the rise of sham or dependent labor organizations, a result most undesirable under a statutory policy which promotes autonomy and self-determination. And, most important, the Board since last summer, has attempted to affirmatively promote legitimate employee cooperation programs under the statute as written.

As you know, there are two parts of the legal problem under the NLRA. In order for a company union problem to arise under Section 8(a)(2) an employee organization must be found to be a "labor organization" within the meaning of the Act. In this regard, the Supreme Court in NLRB v. Cabot Carbon Co.<sup>2</sup> established an extremely broad definition for labor organization almost 40 years ago -- it covers far more entities than unions which we typically think of as labor organizations -- and, thus, has made many such employee mechanisms fit the statutory definition.

This is an important part of the problem because an organization can be only "unlawfully" assisted or dominated under Section 8(a)(2) if it meets the labor organization test. Last summer I addressed both issues in my separate concurring opinion in Keeler Brass Co.<sup>3</sup> Though I found that the Grievance Committee in that case was a labor organization within the meaning of the Act, I explicitly stated that I would not find other employee groups to fall within the definition. I stated that I agreed with the Board decisions of the 1970s which had held employee participation groups not to be labor organizations.<sup>4</sup> In those cases the Board held that employee groups which rendered final decisions and did not interact with management performed "purely adjudicatory functions" which had been delegated to it by employers and thus did not "deal with" the employer within the meaning of Section 2(5) of the Act which defines a labor organization. I stated that I fully agreed with the Board's decision and rationale in those cases and that they are

---

<sup>2</sup> 360 U.S. 230 (1959).

<sup>3</sup> 317 NLRB 1110 (1995).

<sup>4</sup> The cases of which I expressed approval are John Ascuaga's Nugget, 230 NLRB 275 (1977) and Mercy-Memorial Hospital, 231 NLRB 1108 (1977).

**“... consistent with the movement toward cooperation and democracy in the workplace which I have long supported.” I further stated:**

**This movement is a major advance in labor relations because, in its best form, it attempts nothing less than to transform the relationship between employer and employees from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another. Such a transformation is necessary for the achievement of true democracy in the workplace. However, it does pose a potential conflict with the National Labor Relations Act, enacted in 1935 at a time when the adversarial struggle between management and labor was at its height.<sup>5</sup>**

**In Keeler Brass I concluded that the Committee, since it did not have the authority to adjudicate, was not covered by the precedent which I embraced in that opinion. Since it made recommendations about grievances and employment conditions -- recommendations about which the Committee was not the final arbiter -- it was a labor organization within the meaning of the Act. Accordingly, I then considered the question of whether the employer had unlawfully dominated or interfered with the labor organization in question.**

**In considering this issue I stated my approval of the Court of Appeals for the Seventh Circuit's approach to this issue in the landmark Chicago Rawhide decision.<sup>6</sup> The court established in that case, as I noted in my concurring opinion, a demarcation line between support and cooperation. As I said:**

**The court defined support as the presence of 'at least some degree of control or influence,' no matter how innocent. Cooperation, on the other hand, was defined as assisting the employees or their bargaining representatives in carrying out their 'independent intentions.' The court went on to find that assistance or cooperation may be a means of domination, but that the Board must prove that the assistance actually produces employer control over the organization before a violation of Section 8(a)(2) can be established. Mere potential for control is not sufficient; there must be actual control or domination. The court set forth the following test: 'The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.'**  
**[Footnotes omitted.]<sup>7</sup>**

---

<sup>5</sup> 317 NLRB 1110 at 1117.

<sup>6</sup> 221 F.2d 165 (7th Cir. 1955).

<sup>7</sup> 317 NLRB 1110 at 1117.

I said in Keeler Brass -- and say here again today -- that I approve of the Seventh Circuit's statement holding promoting good and cooperative relationships. I also agree that the subjective views of the employees must be taken into account as the Seventh Circuit said in both Chicago Rawhide and Electromation<sup>8</sup> -- but that to rely completely upon employee satisfaction would undermine extant Supreme Court precedent.<sup>9</sup>

Although the employee cooperative program in Chicago Rawhide originated with the employees, I said in Keeler Brass that an employee group does not have to originate with employees but can be promoted or suggested by the employer and not run afoul of the prohibitions against assistance and domination. As I said:

I do not think these efforts are unlawful simply because the employer initiated them. The focus should, instead, be on whether the organization allows for independent employee action and choice. If, for example, the employer did nothing more than tell employees that it wanted their participation in decisions concerning working conditions and suggested that they set up a committee for such participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.<sup>10</sup>

Thus, I noted in Keeler Brass that the factors in favor of dismissal were that the employer did not create the committee in response to a union organizational campaign, that the committee was voluntary and employees were the voting members of the committee and all of them were elected by employees. Accordingly, I was of the view that there was some measure of free choice and "scope for independence." On the other hand, the fact that the employer set time limits for terms for membership, established eligibility rules and election procedures and conducted the election, announced the results of the election, dictated the number of employees who could serve on the committee, established meeting days and allowed special meetings to be held only with management approval argued in favor of unlawful domination. As I said:

These elements of control indicates that the committee is not capable of action independent of the employer. Perhaps the most telling aspect of dependency is that the committee cannot even make a

---

<sup>8</sup> Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994) enf. 309 NLRB 990 (1992).

<sup>9</sup> NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 249 (1939).

<sup>10</sup> 317 NLRB 1110 at 1119.

decision about when it will meet without prior approval from the employer.<sup>11</sup>

I am of the view that the Board in these past two years moved closer to the support for employee cooperative programs, which I expressed last summer, in a series of decisions issued on December 18, 1995. For instance, in Stoody Company<sup>12</sup> a unanimous Board said: "We support an interpretation of the Act which would not discourage such [employee participation] programs." In this case the employer created a committee, the Handbook Committee, to gather information about sections in the handbook which were inconsistent with the current practice, that were obsolete or that were misunderstood by employees. The committee was not established to discuss wages, benefits or working conditions. But during the only meeting of the committee, which lasted one hour, employees raised questions concerning vacation time and the employer's representative participated in these discussions. Subsequently, the company stated again that the committee was not designed to discuss such subjects.

The Board in Stoody Company rejected the view that the employee group in question was a labor organization within the meaning of the Act. Thus, the prohibitions regarding unlawful assistance and domination were inapplicable. In an important passage which ought to get the attention of the Senate when it considers the TEAM Act in the coming months, the Board said the following:

Drawing the line between a lawful employee participation program and a statutory labor organization may not be a simple matter because it may be difficult to separate such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of labor organization. If parties are burdened with the prospect that any deviation, however temporary, isolated, or unintended, from the discussion of a certain subject, will change a lawful employee participation committee into an unlawfully dominated labor organization, they may reasonably be reluctant to engage in employee participation programs. [Footnote omitted.]<sup>13</sup>

The Board then noted that employees had initiated the discussion of working conditions which would have argued for a labor organization finding and said the following:

What happened here appears to us to be the kind of situation that is likely to occur when an employer is attempting something new and its

---

<sup>11</sup> Id. at 1119.

<sup>12</sup> 320 NLRB No. 1 (December 18, 1995). Besides myself, Members Cohen and Truesdale were on the panel.

<sup>13</sup> 320 NLRB No. 1 at 3.

supervisors have little or no experience with participation efforts. Absent evidence of a pattern or practice, or of a design to interfere with the organizing efforts of an independent labor organization, we do not think such conduct violates the Act.” [Footnote omitted.] <sup>14</sup>

The labor organization aspect of this issue was also presented in Webcor Packaging, Inc. <sup>15</sup> where a plant council was designed to offer recommendations to management about proposed changes in working conditions, such as wages, and management would consider whether to accept or reject these recommendations. The Board found that the council existed to deal with a variety of grievances involving employment conditions including issuing employee vacation paychecks, payment for safety shoes. Unlike the cases which the Board had decided in the ‘70s in which I found to be appropriate decisions in Keeler Brass, the council had no authority to make decisions on its own. All that was involved was an obligation on the part of management to take the matter under advisement and consider the employee proposal very seriously. Said the Board:

We accordingly conclude that the record evidence establishes that the Plant Council existed for the purpose, at least in part, of following a pattern or practice of making proposals to management which would be considered and accepted or rejected, and that such a pattern in fact occurred. <sup>16</sup>

Accordingly, the Board found that the council was a labor organization which was “dealing with” management. Since the record established that the council was a creation of management and that its structure and function were essentially determined by it, unlawful domination under Section 8(a)(2) was found to exist.

Similarly, in Dillon Stores <sup>17</sup> the Board found that most if not all of the proposals and grievances put forward by an Associates Committee concerning such terms and conditions of employment as rotation of shifts, premium pay, and dirty break rooms. In light of an Administrative Law Judge finding that the committee determined which employees would serve as representatives, the term of office, the election dates and times, the employer provided provision for notices, ballots, ballot boxes and tally facilities, as well as election procedure and payment for employee representatives for their time spent at meetings, I concluded that the committee

---

<sup>14</sup> Id. at 4.

<sup>15</sup> 319 NLRB No. 142 (December 18, 1995). Members Browning and Truesdale were on this panel, along with myself.

<sup>16</sup> Id. at 2.

<sup>17</sup> 319 NLRB No. 149 (December 18, 1995). Again, the panel consisted of Members Browning, Truesdale and myself.

“... freedom of choice and independence of action open to employees is too strictly confined within parameters of Respondent’s making for the committee to be a genuine expression of democracy in the workplace.”

In a fourth decision, Vons Grocery Co.,<sup>18</sup> the question was whether an employee participation group interfered with the union’s role as exclusive bargaining representative. In this case, the employer created an entity known as the Quality Circle Group (QCG). The group dealt with dress code matters and an accident point system for truck drivers, reaching agreement on the former matter. We concluded that there was no pattern of practice of making proposals to management and that the proposals on a dress code and accident point policy were “... an isolated incident in the long life of the QCG.” And we noted that even in that situation, the union was informed of proposals and brought into consultation before any decision was made. When the union complained about the role of QCG representatives, the employer immediately changed the format so as to include a union steward at each meeting. The Board concluded, in a vein similar to Stoody, that one incident did not make a pattern of practice of dealing with the employer within the meaning of Section 2(5). We thus dealt with this matter in a manner similar to our conclusion in Stoody. We said:

In sum, we do not believe that this one incident [the dress code and accident policy] should transform a lawful employee participation group into a statutory labor organization. We do not believe that what happened here poses the dangers of employer domination of labor organizations that Section 8(a)(2) was designed to prevent.<sup>19</sup>

These four December 18 decisions are all compatible with the strong support for employee cooperation that I articulated in my July 14, 1995 concurring opinion in Keeler Brass. Acceptance of this approach makes it clear that the TEAM Act, as presently drafted, is unnecessary.

Nonetheless, as I wrote 3 years ago in *Agenda for Reform*,<sup>20</sup> a revision of Section 8(a)(2) is desirable. The difficulties involved in determining what constitutes a labor organization, under the Act as written, subjects employees and employers to unnecessary and wasteful litigation and mandates lay people to employ counsel, when they are only attempting to promote dialogue and enhance participation and cooperation.

---

<sup>18</sup> 320 NLRB No. 5 (December 18, 1995). Members Cohen and Truesdale were on this panel with myself.

<sup>19</sup> Id. at 2.

<sup>20</sup> W. B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law*, pp. 136-147 (MIT Press) 1993.

The law's insistence upon a demarcation line -- a line admittedly made less rigid by the common sense approach that we undertook in both Stoody and Vons Grocery -- between management concerns like efficiency on the one hand, and employment conditions on the other, simply does not make sense. The line is synthetic and inconsistent with contemporary realities of the workplace where it is impossible to distinguish between the pace of the work or production standards and quality considerations for which all employees can and should have responsibility.

Accordingly, Congress and the President should amend Section 8(a)(2) so as to allow all employee committees and councils and quality work circles to function, addressing any and all subjects outside any cloud of illegality -- and to allow employers to devise proposals and assist such mechanisms free from liability so long as employee autonomy is protected and respected. In connection with such employee groups, the Act's prohibition against assistance should be eliminated altogether. In this way, employee participation and involvement would be promoted, sham unions discouraged, and wasteful, sometimes acrimonious litigation about what constitutes a labor organization eliminated. But this is hardly the answer to what ails Section 8(a)(2) set forth in the TEAM Act.

This was the objective of Congressman Thomas Sawyer's bill which he proposed last fall as a substitute for the TEAM Act. It was designed to encourage productivity and quality teams without opening the door to sham unions -- which I believe is a constructive approach.

We must move beyond the "them and us" mentality of an adversarial model which excludes cooperation between employees and management. Employees should be able to collaborate with management in establishing such teams, setting the agenda for meetings, determining voting procedures for election of representatives and on debated issues.

Only a month ago, in his State of the Union Message, President Bill Clinton said:

When companies and workers work as a team, they do better. And so does America.

The President's road is the road of dialogue, cooperation and settlement processes rather than litigation. That is the road taken by our small and independent administrative Agency through our new ALJ rules, my concurring opinion in Keeler Brass and our December 18 rulings.

Thus, through both adjudication and rulemaking, the Board has taken practical steps, consistent with the purposes and objectives of the Act as written, to reduce costs and delays, avoid unnecessary litigation through these and other steps which are beyond the scope of this speech.

**Thank your for your attention. I hope that the distinguished tradition of these seminars continues long into the future.**

**And I look forward to continued counsel from people like Leland Cross, and others, here in Indianapolis. For it is this counsel received through our advisory panels which have proved to be so constructive and valuable -- and it has permitted us to move forward, building a better today and tomorrow for our society's employees and employers.**

**# # #**